Before the
Federal Communications Commission
Washington, D.C.20554

In the Matter of	)	
	)	
8YY Access Charge Reform	)	**WC Docket No. 18-156**
	)	

COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES IN RESPONSE TO JUNE 8, 2018 FURTHER NOTICE OF PROPOSED RULEMAKING

Thomas J. Moorman
tmoorman@woodsaitken.com
Woods & Aitken LLP
5151 Wisconsin Ave. NW, Suite 310
Washington, D.C. 20016
(202) 944-9502

Paul M. Schudel, No. 13723
pschudel@woodsaitken.com
Woods & Aitken LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
(402) 437-8500

Their Attorneys

Date: September 4, 2018

TABLE OF CONTENTS

SUMMARY

The Nebraska Rural Independent Companies ("NRIC"), each of which is a Rate of Return ("ROR") carrier, submit these comments in response to the June 8, 2018 Further Notice of Proposed Rulemaking (the "*8YY FNPRM*") in WC Docket No. 18-156. As demonstrated herein, the Federal Communications Commission (FCC") has failed to provide the necessary factual, policy and legal justification within the *8YY FNPRM* to impose any industry-wide transition to bill and keep from current rate and rate structures associated with originating 8YY exchange access traffic in particular and all originating exchange access traffic in general. In the event that actual arbitrage 8YY situations are proven, existing FCC procedures can be used to address those found arbitrage situations, or specifically tailored rules aimed at such 8YY arbitrage situations can be prescribed, with connecting carriers not involved in any such proven arbitrage not being subject to any such tailored rules simply due to such carrier's connecting carrier status. As such, for the reasons stated herein, the FCC must:

(1) Provide a sustainable, rational explanation as to why there is any need for an industry-wide disruption of the 8YY access charge marketplace when the Commission's own *8YY FNPRM* has not identified the volume of arbitraged 8YY traffic vis-à-vis non-arbitraged 8YY traffic, has not identified the number of carriers that may be engaged in such arbitrage, and has provided no sustainable rationale to explain why the FCC's Enforcement Bureau cannot adequately address the carrier-specific issues in a prompt and comprehensive manner;

(2) Establish a lawful basis upon which the Commission has authority to transition all originating 8YY access to "bill and keep";

(3) Avoid any increase in end user charges by ROR carriers because the establishment of such charges *unquestionably* and *in fact* will take what is currently a "toll free" service and convert that service into a service where the originating end user is the "payor" of the long distance call and thus the call is not "free"; and

(4) Should there be any elimination or reduction in 8YY originating exchange access charges, establish a higher, dynamic federal Universal Service Fund ("USF") level for ROR carriers to recover reductions in 8YY charges recognizing that a portion of the expense reduction to 8YY retail Interexchange Carriers will help fund the dynamic USF outlined herein, should such reductions increase retail 8YY traffic revenues.

Before the
Federal Communications Commission
Washington, D.C.20554

In the Matter of	)	
	)	
8YY Access Charge Reform	)	**WC Docket No. 18-156**
	)	

COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES IN RESPONSE TO JUNE 8, 2018 FURTHER NOTICE OF PROPOSED RULEMAKING

The Nebraska Rural Independent Companies ("NRIC")[1] hereby provide these comments in response to the June 8, 2018, Further Notice of Proposed Rulemaking issued by the Federal Communications Commission ("the "Commission" or the "FCC") and published in the Federal Register on July 3, 2018.[2] In the *8YY FNPRM* the Commission invited comments on issues related to the intercarrier compensation treatment of 8YY exchange access traffic, including those addressed herein; the Commission's legal authority regarding efforts to take 8YY and

[1] The NRIC companies submitting these Comments are: Arlington Telephone Company, Blair Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K & M Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company and Three River Telco. Each of the NRIC companies is an Incumbent Local Exchange Carrier ("ILEC") as defined under Section 251(h) of the Communications Act of 1934, as amended (the "Act"), *see* 47 U.S.C. § 251(h), and are interstate Rate of Return ("ROR") carriers.

[2] *See In the Matter of 8YY Access Charge Reform, Further Notice of Proposed Rulemaking*, WC Docket No. 18-156, FCC 18-76 (rel. June 8, 2018) (the "*8YY FNPRM*"), published in summary form at 83 Fed. Reg. 31099 (July 3, 2018); *see also Public Notice*, WC Docket No. 18-156, DA 18-694, released July 3, 2018.

ultimately all originating access to bill and keep; and the specific cost recovery framework applicable to ROR carriers such as each of the NRIC members.

I. INTRODUCTION

NRIC wishes to clearly state that it opposes instances where legitimate exchange access services are undermined by instances of *proven* access arbitrage.[3] But incidents of proven arbitrage and a need for elimination of the 8YY originating access regime *are two distinct* matters. As a general observation, two unequivocal facts exist: (1) 8YY exchange access traffic is significant[4] and (2) the Commission's *8YY FNPRM* proposals raise significant factual, public policy and legal issues. Particularly due to the apparent limited number of *alleged* arbitrage activities,[5] NRIC respectfully submits that the Commission should avoid needless industry revenue recovery disruptions that the *8YY FNRPRM* portends, particularly since, as a matter of

---

[3] *See* Reply Comments of [NRIC] in Response to June 29, 2017, Public Notice, WC Docket Nos. 10-90 *et al.*, filed August 15, 2017 (the "*NRIC 2017 8YY Update Reply Comments*") at 2.

[4] NRIC has previously made submissions addressing several of the issues noted in the *8YY FNPRM*. *See* Comments of [NRIC] in Response to Sections XVII. L through R of the Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90 *et al.*, filed February 24, 2012 (the "*NRIC 2012 FNPRM 8YY Comments*") at 8-13; Reply Comments of [NRIC] in Response to Sections XVII. L through R of the Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90 *et al.*, filed March 30, 2012 (the "*NRIC 2012 FNPRM 8YY Reply Comments*") at 2-5; Comments of [NRIC], WC Docket No. 16-363, filed December 2, 2016 ("*NRIC AT&T Forbearance Comments*") at 6; Comments of [NRIC] in Response to June 29, 2017, Public Notice, WC Docket Nos. 10-90 *et al.*, filed July 31, 2017 (the "*NRIC 2017 8YY Update Comments*"); *NRIC 2017 8YY Update Reply Comments*. These submissions are incorporated herein by reference and, with these instant comments, amply demonstrate the appropriateness of a targeted approach to addressing the 8YY exchange access marketplace

[5] For purposes of these comments, NRIC will use the term "arbitrage" based upon the assumption that some level of 8YY traffic in question has, in fact, been proven to be subject to exchange access charges and structures that are inconsistent with existing Commission Rules. Absent such finding, however, NRIC recognizes that *allegations* have been made regarding some undefined magnitude of 8YY arbitrage but allegations are not factual findings.

common sense, existing FCC-established procedures – the complaint process[6] – provide a mechanism to address any "bad actors" that are proven to be engaging in 8YY arbitrage activities. Alternatively, targeted rules regarding proven 8YY arbitrage may be appropriate.

Any effort to convert allegations of 8YY arbitrage into the need for some industry-wide alteration of originating 8YY access, in particular, and all originating access must in general address significant factual, public policy and legal issues. By way of example, the FCC must:

(1) Provide a sustainable, rational explanation as to why there is any need for an industry-wide disruption of the 8YY access charge marketplace when the Commission's own *8YY FNPRM* has not identified the volume of arbitraged 8YY traffic vis-à-vis non-arbitraged 8YY traffic, has not identified the number of carriers that may be engaged in such arbitrage, and has provided no sustainable rationale to explain why the FCC's Enforcement Bureau cannot adequately address the carrier-specific issues in a prompt and comprehensive manner;

(2) Establish a lawful basis upon which the Commission has authority to transition all originating 8YY access to "bill and keep";

(3) Avoid any increase in end user charges by ROR carriers because the establishment of such charges *unquestionably* and *in fact* will take what is currently a "toll free" service and convert that service into a service where the originating end user is the "payor" of the long distance call and thus the call is not "free"; and

(4) Should there be any elimination or reduction in 8YY originating exchange access charges, establish a higher, dynamic federal Universal Service Fund ("USF") level for ROR carriers to recover reductions in 8YY charges recognizing that a portion of the expense reduction to 8YY retail Interexchange Carriers ("IXCs") will help fund the dynamic USF outlined herein should such reductions increase retail 8YY traffic revenues.

---

[6] NRIC notes that recently the Commission issued a decision streamlining the complaint process. *See In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau, Report and Order*, EB Docket No. 17-245, FCC 18-96 (rel. July 18, 2018) ("*Complaint Process R&O*").

II. CONSISTENT WITH HISTORICAL FACTS, ORIGINATING 8YY EXCHANGE ACCESS MINUTES OF USE CONTINUE TO BE SIGNIFICANT.

NRIC has previously commented on various 8YY access charge issues raised by the Commission in the *2011 ICC/USF Transformation FNPRM.*[7] In the *NRIC 2012 FNPRM 8YY Comments*, NRIC demonstrated that the volume of 8YY originating traffic for 2011 was "significant," adding "that the percentage of originating traffic to an 8YY number currently ranges from 20 to 36 percent for the companies that comprise NRIC."[8] In response to the *June 2017 8YY Public Notice*[9] NRIC stated that for its member companies:

> (1) based on calendar year 2016 data, *total* interstate and intrastate originating 8YY traffic was thirty-five percent (35%) of total originating switched access traffic for the period;
>
> (2) [b]ased on calendar year 2016 data, originating *interstate* 8YY traffic was fifty-seven percent (57%) of total *interstate* originating switched access traffic; and
>
> (3) [f]or the first six (6) months of 2017, originating *interstate* 8YY traffic was also fifty-seven percent (57%) of total *interstate* originating switched access traffic.[10]

In response to the Commission's request,[11] NRIC now updates these statistics and notes that based on interstate and intrastate data provided by a number of NRIC members:

---

[7] *In the Matter of Connect America Fund, et al., Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90 *et al.*, 26 FCC Rcd 17663 (2011), *aff'd* In Re: FCC 11-161, 753 F.3d 1015 (10th Cir. 2014), *pet. for cert. denied* (the "*2011 ICC/USF Transformation Order*").

[8] *See NRIC 2012 FNPRM 8YY Comments* at 9.

[9] *See Public Notice*, WC Docket Nos. 10-90 *et al.*, DA 17-631, released June 29, 2017 (the "*June 2017 8YY Public Notice*").

[10] *See NRIC 2017 8YY Update Comments* at 4-5.

[11] *See 8YY FNPRM* at ¶¶ 22, 66.

(1) Although State Commissions have authority over intrastate 8YY traffic, based on calendar year 2017 data, *total* interstate and intrastate originating 8YY traffic was approximately thirty-two percent (32%) of total originating switched access traffic for the period and fifty five percent (55%) of total originating interstate switched access minutes; and

(2) Based on calendar year 2017 data, originating *interstate* 8YY revenue was approximately fifty-five percent (55%) of total *interstate* originating switched access revenue.

As was true in 2012 and remains true today, NRIC again respectfully submits that this actual calling data demonstrates that the relative amount of originating *interstate* 8YY traffic compared to total originating traffic continues to be as significant as it was in 2011. Moreover, in response to the Commission-requested "resolution" for the intercarrier compensation regime associated with such *interstate* 8YY traffic,[12] NRIC once again confirms that "such traffic must have a 'distinct' resolution provided for it."[13] NRIC respectfully submits that no carrier should be able to use another carrier's originating network free of charge. Providing a carrier or a class of service with a "free ride" on an originating RLEC's network cannot possibly comply with common sense and rational cost causation principles (*i.e.*, in the absence of the 8YY service ordered by the IXC, no originating exchange access related to that service could be made).

III. THE COMMISSION'S INDUSTRY-WIDE PROPOSALS WITHIN THE *8YY FNPRM* FAIL FROM A LACK OF FACT-FINDING.

The Commission asserts in the *8YY FNPRM* that the current intercarrier compensation system "encourages bad actors to place fraudulent, or otherwise illegitimate, robocalls with the sole purpose of generating originating access revenues."[14] It is further asserted that the "current

---

[12] *June 2017 8YY Public Notice* at 1.

[13] *NRIC 2012 FNPRM 8YY Comments* at 9 *quoting 2011 ICC/USF Transformation Order* at ¶ 1304.

[14] *8YY FNPRM* at ¶ 17.

intercarrier compensation system for telephone calls made to toll free (8YY) numbers is rife with opportunities for arbitrage and fraud."[15] NRIC is concerned as to the lack of data-driven analysis contained within the *8YY FNPRM* and thus an uncertain factual basis for such statement, particularly when the reforms that have been proposed require a complete upheaval of the intercarrier compensation framework for 8YY traffic.[16]

The Commission appears to place significant reliance on the complaints raised by AT&T in its petition for forbearance, that "'some LECs are engaged in schemes to overcharge' for certain originating 8YY traffic" and further claiming that "'arbitrage schemes are increasingly shifting to 8YY.' "[17] But therein lies the issue. What justification exists for disrupting industry

---

[15] *Id.* at ¶ 1.

[16] Separate and apart from its own fact gathering which one would have expected to have been reflected in the *8YY FNPRM,* NRIC recognizes that the FCC is seeking to establish from commenters the factual record to support the proposed reforms. *See, e.g., 8YY FNPRM* at ¶¶ 25-29. Nonetheless, Commission fact-finding is a necessity to support its actions in order to demonstrate that the decision is not arbitrary and capricious. *See, e.g., Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, No. CV 16-259 (BAH), 2018 WL 3719268, at *9 (D.D.C. Aug. 3, 2018)("'Agency action is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.' " *Animal Legal Def. Fund, Inc. v. Perdue* ("*ALDF*"), 872 F.3d 602, 611 (D.C. Cir. 2017) (alteration in original) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *see also Am. Great Lakes Ports Ass'n v. Zukunft*, 296 F. Supp. 3d 27, 36 (D.D.C. 2017) (With respect to the arbitrary or capricious standard in the context of a notice and comment rulemaking, "' [t]he function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). This requires the agency to "'articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts.' "). Here, for example, no such fact finding has been made on the extent of so-called 8YY arbitrage and therefore the need for a rational basis as to why some form of industry-wide action is required can be justified is even more necessary.

[17] *8YY FNPRM* at ¶ 19 (quoting *Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges*, WC Docket No. 16-363, at 10-11 (filed on Sept. 30, 2016).

access structures and cost recovery when the facts underlying the purported facts supporting the claimed need for such industry-wide action have not *been proven?*[18] Moreover, the record also does not establish how many alleged "unreasonably inflated charges" are caused by these "bad actors".[19]

In any event, the large IXCs are free to pursue alternatives available to them – a complaint or court action. Based on the size of such 8YY IXC providers, NRIC questions how such alternatives could rationally be claimed to cause administrative burdens or competitive dislocations for these providers. For example, given that 8YY traffic, according to the FCC, "appears to be increasing, at least relative to other originating access minutes", [20] it is questionable how such alternatives would disrupt the 8YY competitive marketplace. Once the new FCC complaint rules are effective on October 4, 2018,[21] the use of the complaint process to address alleged 8YY arbitrage is all the more rational. As the FCC has stated, "[w]e find that these rule revisions will eliminate inconsistencies among various complaint proceedings, promote a fully developed record in each case, foster disposition of formal complaints in a timely manner, and conserve resources of the parties and the Commission."[22] Likewise, as stated by Chairman Pai in connection with the adoption of the *Complaint Process R&O* "[t]hese updates will simplify and expedite the process for handling formal complaints that will both serve the public better and make more efficient use of

---

[18] As set forth in previous comments, NRIC certainly opposes instances where legitimate exchange access services are undermined based on proven arbitrage. *See NRIC 2017 8YY Update Reply Comments* at 2.

[19] *8YY FNPRM* at ¶¶ 4, 17 (respectively).

[20] *Id.* at ¶ 7 (footnote omitted); *see also* https://www.somos.com/blog/fulfilling-demand-world-toll-free (last visited September 1, 2018).[21] *See* 83 Fed. Reg. 44831 (September 4, 2018)

[21] *See* 83 Fed. Reg. 44831 (September 4, 2018)

[22] *Complaint Process R&O* at ¶ 1.

staff resources."[23] Commissioner O'Rielly further stated that the streamlining is expected to "reduce confusion and generate quicker resolution for those seeking redress under various statutory provisions."[24]

In addition, the Commission's other purported bases for its efforts to disrupt the 8YY exchange access marketplace are also factually questionable. First, the Commission states that "[w]ith the proliferation of unlawful robocalls, the volume of traffic routed to 8YY numbers no longer depends on the 'promotional efforts' of the 8YY subscriber. Indeed, just the opposite is true—fraudulent calls are only 'controllable from the originating point.'"[25] The FCC provides no basis for its latter statement and the 1976 order upon which it relies[26] addressed a Bell memorandum that spoke only to what was *not* controllable from the originating point for Inward WATS, not what *was* controllable. For sake of argument, however, if robocalls made to a 8YY carrier are in control of the originating exchange access provider, the FCC has not explained why the 8YY retail IXC cannot otherwise track such calls, thus allowing targeted action against such originating exchange access provider.

Second, even the Commission recognizes it has no record to advance its industry-wide 8YY access upheaval as illustrated by the following statement: "In the interest of having a robust record, we seek additional comment on the existence, prevalence, and impact of each of

---

[23] *Complaint Process R&O*, Statement of Chairman Ajit Pai.

[24] *Complaint Process R&O*, Statement of Commissioner Michael O'Rielly.

[25] *8YY FNPRM* at ¶ 32 (quoting *AT&T Co. (Long Lines Department), Docket No. 19989, Final Decision and Order*, 59 FCC 2d 671, 685-86, ¶ 28 (1976)).

[26] See *AT&T Co. at* ¶ 28 ("The amounts of traffic offered to the network with Outward WATS can be anticipated and controlled at the point of origin; but the calling characteristics, volumes and patterns of calls to Inward WATS lines are influenced by the promotional efforts of the customer and are therefore not controllable from the originating point.").

these reported schemes and on any other 8YY-related schemes that commenters propose we address."[27] Nonetheless, later the FCC concludes that such "reported schemes"[28] exist, seeking comments on whether the proposals it offers "will curtail 8YY abuses",[29] and indicates that rule changes will address "abuses of the intercarrier compensation system for 8YY."[30] In short, the FCC cannot say on the one hand that a record needs to be established while on the other hand presumes that the yet-to-be-established record supports the conclusions it intends to reach. Findings need to be made as to why an industry-wide solution is necessary. No record of the *extent of industry-wide arbitrage* exists and no findings in this regard are provided in the *8YY FNPRM.*

Third, the FCC states that the "basic logic underpinning our proposal is that each carrier should be responsible for the costs of the parts of the call path which it has discretion to choose."[31] The FCC has failed to reconcile this proposition with either the ability of 8YY carriers to seek direct connections for high volume traffic routes or, for that matter, the fact that the cost causer is the 8YY retail IXC provider and it should be in the position to identify any alleged arbitrage.

The FCC has not established the proposition that the carrier providing the originating 8YY exchange access is, in fact, the cost causer. The FCC's apparent effort to shift the cost of an originating exchange access 8YY provider not found to be engaged in arbitrage turns the

---

[27] *8YY FNPRM* at ¶ 24.

[28] *Id.*

[29] *Id.* at ¶ 35.

[30] *Id.* at ¶ 37.

[31] *See id.* at ¶ 34 *citing USF/ICC Transformation Order* at ¶ 999 (discussing allocation rule for LEC-CMRS points of interconnection).

concept of "cost causer" on its head.[32] The RLEC, as the originating exchange access provider, is not the "cost causer" of the 8YY call. The cost causer is the carrier ordering 8YY service for that carrier's 8YY subscriber, namely the retail 8YY IXC provider.[33] Thus, the FCC's statement that "8YY subscribers are paying originating carriers that they did not select"[34] is factually inaccurate because it is the IXC providing the 8YY retail service that pays the access charges of the originating exchange access carrier and options exist for that IXC to respond to alleged arbitrage. Moreover, if the reference to "8YY subscriber" in this section of *8YY FNPRM* was not intended to mean the IXC ordering the exchange access service,[35] that IXC, when ordering such service, knows the entity(ies) to whom the IXC sent an order.

In the end, an 8YY carrier currently has options it can pursue without moving 8YY traffic to bill and keep. The Commission's proposed rule revisions are directly at odds with its policy positions concerning cost causation and cost recovery; therefore, remedial action should not disrupt

---

[32] *See In the Matter of Investigation of Interstate Access Tariff Non-Recurring Charges, Memorandum Opinion and Order*, CC Docket No. 85-166, 2 FCC Rcd 3498 at ¶ 34 (1987) ("Absent a convincing showing, we believe the public interest is best served, and a competitive marketplace is best encouraged, by policies that promote the recovery of costs from the cost-causer."); *see also In the Matter of Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration*, WC Docket No. 07-245, 26 FCC Rcd 5240 at ¶ 143 (2011) (footnote omitted) ("Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer – the cost causer – pays a rate that covers this cost.").

[33] *See NRIC 2017 8YY Update Comments* at 5; *NRIC 2017 8YY Update Reply Comments* at 5.

[34] *8YY FNPRM* at ¶ 43.

[35] The distinct differences between the ordering 8YY IXC and the 8YY subscriber was noted at paragraph 4 of the *8YY FNPRM. See id.* at ¶ 4 ("The proposals we set forth in this Further Notice of Proposed Rulemaking (*Notice)* should limit unreasonably inflated charges billed to IXCs—and, presumably, passed on to 8YY subscribers. . . ."). Even if the term "8YY subscriber" as used within paragraph 43 of the *8YY FNPRM is* intended to mean the customer that has ordered the retail 8YY service from the IXC, the FCC statement's inaccuracy remains: any failure to discuss from whom the originating access is being received or the effect that such originating access may have on the IXC's retail 8YY service are and should remain issues between the IXC and its retail 8YY customer.

industry-wide 8YY originating access frameworks. If rules are required, specifically tailored rules aimed at such 8YY arbitrage situations can be prescribed as has been done before for those carriers actually involved in proven arbitrage.[36] A connecting carrier not involved in any such proven arbitrage should not be subject to any such tailored rules simply due to such carrier's connecting carrier status.

IV. THE COMMISSION HAS NOT DEMONSTRATED THAT IT HAS STATUTORY AUTHORITY TO TAKE ALL ORIGINATING 8YY ACCESS TO BILL AND KEEP.

The Commission infers in the *8YY FNPRM* that the entire scope of its authority over intrastate originating access, for example, has been affirmed by prior court rulings.[37] RIC respectfully submits that the Commission overstates the degree of latitude that it was afforded by the 10th Circuit Court of Appeals in the *2011 ICC/USF Transformation Order* with respect to originating access charges. Although the Court, using a *Chevron*[38] analysis, concluded that the Commission's interpretation of § 251(b) allows for some regulation of intrastate originating access, the Court determined that the petitioners' challenge of the Commission's authority to prohibit originating access charges was not ripe for decision,[39] and, in any event, the Court's discussion was not based on 8YY traffic in particular.

---

[36] *See, e.g.,* 47 C.F.R. §§ 61.3(bbb), 61.26(g).

[37] *See* 8YY FNPRM at ¶¶ 78-82.

[38] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[39] *In re FCC 11-161*, 753 F.3d 1015, 1124 (10th Cir. 2014) ("Because the FCC has not yet abolished originating access charges, this challenge is unripe."). With respect to the FCC's announcement that it would eventually abolish originating access charges the Court noted that the FCC was seeking further comment "on other possible approaches to originating access reform, including implementation issues and our legal authority to adopt any such reforms." *Id.* (quoting USF/ICC Transformation Order at ¶ 1305).

Thus, contrary to any inference within the *8YY FNPRM*, the courts have not concluded that the Commission has *carte blanche* authority to require bill and keep for all originating access.[40] The FCC's authority to establish rules governing *interstate* originating access ultimately rests within Section 201 of the Act and, consistent with prior actions, the establishment of a proper cost recovery mechanism. With respect to the FCC authority over *intrastate* exchange access originating traffic in general or originating *intrastate* 8YY traffic in particular, questions remain in light of the *8YY FNPRM* regarding how the FCC must act to comply with the 10th Circuit's statutory authority discussion.[41] Such issue, however, can

[40] Moreover, as was stated by the now deceased Justice Antonin Scalia, a reviewing court must "tak[e] seriously, and apply[ ] rigorously, in all cases, statutory limits on agencies authority." *City of Arlington, Tex. V. F.C.C.* 569 U.S. 290, 307(2013). NRIC further notes that, the Chief Justice and another current Justice questioned the ruling that courts should not be the arbiters of what the statutes state. *See, e.g., id*, Dissenting Opinion of Chief Justice Roberts, Justice Kennedy and Justice Alito, 569 U.S. at 312.

[41] In this regard, NRIC also notes that, whether it be the "major rules doctrine", a legislative interpretation doctrine providing that Congress should "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance[.]" U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 403 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (quoting Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444, 189 L. Ed. 2d 372 (2014) (internal citations omitted)), the FCC lacks the authority over intrastate originating access. *See also King v. Burwell*, —— U.S. ——, 135 S.Ct. 2480, 2488–89, 192 L.Ed.2d 483 (2015) ("[H]ad Congress wished to assign that [extraordinary] question to an agency, it surely would have done so expressly;" requiring the Court to interpret the statute *de novo* for a clear statement of congressional authorization); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); *Brown & Williamson*, 529 U.S. 120, 160 (2000) (authorizing an agency to regulate on a matter of "such economic and political significance" would not occur "in so cryptic a fashion"); *MCI Telecomms. Corp.*, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."). NRIC is not aware of these issues being before the 10th Circuit court when it addressed the *USF/ICC Transformation Order*.

possibly be avoided, or at least minimized, should the FCC take action in response to a specific alleged 8YY arbitrage incident.

V. IF THE FCC WERE TO MOVE FORWARD AND REDUCE ANY FORM OF ORIGINATING 8YY ACCESS, THE FCC WILL NEED TO ADDRESS THE QUESTIONS SET FORTH BELOW.

The FCC is caught in a conundrum. In seeking to reduce at least originating 8YY access, the FCC will be forced to justify a windfall that will be received by the IXCs and the absence of any requirement that these carriers must reflect the benefits arising from reduced originating access costs in reduced rates to consumers. Further, if the FCC attempts in an effort to develop an industry-wide solution to shift the recovery of 8YY access charges to end users, the FCC will need to further explain how that action will not, in fact, transform a toll free service into a paid originating end user service. Alternatively, if the FCC in attempting to address some industry-wide solution seeks to replace lost access revenue with support provided by the current ROR federal USF program, the FCC will need to develop the factual basis for the proper recovery of such access costs and lost revenues within an increased federal USF budget for ROR carriers. Rational decision making requires the FCC to undertake the fact finding necessary to answer these three critical questions and to fashion a resolution that comports with law. The absence of such detail in the *8YY FNPRM* raises significant factual, legal and public policy questions regarding the actions that the FCC purports to pursue in this proceeding.

A. What Public Interest Benefits would Arise Should 8YY Originating Exchange Access Transition to Bill and Keep?

Arising from the *USF/ICC Transformation Order*, the FCC anticipated increased Internet Protocol network deployment and broadband deployment to justify the imposition of terminating end office bill and keep. No factual findings confirming such anticipated results have been presented. Consequently, NRIC respectfully submits that the Commission cannot rely upon any

similar alleged "predictive judgment" in this proceeding. In this regard, the FCC points *solely* to wireless subscription as a means to demonstrate the benefit of "bill and keep," but yet prefaces that statement with the assertion that "there are several factors that may explain increased calling,"[42] and then fails to identify or address these other "several factors." However, even more telling is the fact that the *USF/ICC Transformation Order* expected benefits to *both* the *wireless* and wireline industry. Yet, the FCC's "benefit" discussion relates solely to wireless subscriptions. Parties are left to wonder why this is the case?

Contrary to what the FCC suggests in the FNPRM that the anticipated benefits from bill and keep were based on "economic evidence",[43] it is worth noting that the FCC stated in 2011 that the anticipated benefits were based on "economic theory."[44] Even though almost seven (7) years have passed since the issuance of the *USF/ICC Transformation Order*, the FCC has still not provided any specific, valid factual basis to demonstrate that the FCC's 2011 predictive judgements were correct. Consequently, no basis appears within the *8YY FNPRM* for the inference that the prior FCC predictive judgement could justify similar bill and keep action here.[45]

---

[42] *8YY FNPRM* at ¶ 40.[43] *See id.* at ¶40, referencing paragraph 748 of the *USF/ICC Transformation Order*. *See 8YY FNPRM* at n.102.

[43] *See id.* at ¶40, referencing paragraph 748 of the *USF/ICC Transformation Order*. *See 8YY FNPRM* at n.102.

[44] *See USF/ICC Transformation Order* at ¶ 748.

[45] *See, e.g., 8YY FNPRM* at ¶¶ 41-42.

B. How, in the Event Reduction in any Form of Originating 8YY Access, will Increasing End User Charges not, *in Fact*, Unquestionably Alter What is a "Toll Free" Originating End User Service into a Paid Originating End User Service?

The common sense rationale supporting 800 service offerings has been the fact that it is "free" to the end user. Companies that utilize 800 services have been able to advertise the "toll free" nature of the call to facilitate and potentially increase communications from their customers. The changes proposed by the FCC would undermine these consumer benefits. Specifically, the Commission's proposal to "allow rate-of-return carriers to recover their legitimate 8YY costs through reasonable increases in end-user rates — though not through new line items"[46] – would mean that all RLEC customers would be faced with paying higher rates regardless of whether they actually initiate 8YY calls. But any such action belies the nature of 8YY service today – it is free to the originating end user. Rather than address the specific companies that may be causing the purported 8YY arbitrage, the FCC will need to undertake considerable consumer education not only to address consumer expectations associated with "toll free" services but also to address why increased charges are necessary when other remedies such as complaint proceedings exist. If end user charges increase, the FCC will need to explain how, from a common sense perspective, not only what was once a "toll free" call is no longer free but why customers who do not make toll free calls would be subject to the same rate increases as those that do.

C. How is the FCC Going to Establish a Higher, Dynamic Federal USF Level for ROR Carriers to Recover Reductions in 8YY Access Charges or other Originating Access Charges?

The FCC cannot place the burden of the recovery of originating *interstate* 8YY exchange access costs on end users as demonstrated in Section V.B, *supra.* Such recovery must continue

[46] *Id.* at ¶ 66.

to come from either exchange access charges or from increases in the federal USF budget applicable to ROR carriers, like the NRIC members.[47] The continued use of exchange access rates and structures, albeit modified for those entities that have been found to be engaged in arbitrage activities, is preferable. Federal USF budget issues for ROR carriers are already front and center before the Commission.[48] Due to the significance of originating *interstate* 8YY access in particular and originating access in general, the FCC would need to expand the current federal ROR budget to create a modified, dynamic CAF-ICC regime for the recovery of the originating exchange access revenues since, unlike one of the premises used by the FCC for the recovery of terminating access from the current CAF-ICC,[49] no facts have been shown that a decrease in costs will be associated with any decrease in originating 8YY access minutes of use. If a ROR carrier can no longer recover its costs via access charges for originating 8YY traffic, then there needs to be an alternative means of recovery, such as a modified, dynamic CAF-ICC-like mechanism.

VI. CONCLUSION.

For the reasons stated herein, the NRIC members respectfully request that the Commission take action regarding the issues raised in the *8YY FNPRM* as recommended in these comments. No industry-wide disruption regarding alleged 8YY arbitrage is necessary or appropriate. Rather, targeted action related to proven access arbitrage is appropriate and rational.

---

[47] Although jurisdictionally questionable, if the Commission were to preempt state commission authority over any form of originating *intrastate* exchange access, then the federal USF mechanism such as a modified Connect America Fund-ICC ("CAF-ICC") mechanism would need to accommodate lost state exchange access revenue as well.

[48] *See In the Matter of Connect America Fund, et al., Report and Order, Third Order on Reconsideration, and Notice of Proposed Rulemaking*, WC Docket No. 10-90, et al., FCC 18-29, released March 23, 2018; 83 FR 17968 (April 25, 2018).

[49] *See, e.g., USF/ICC Transformation Order* at ¶ 851.

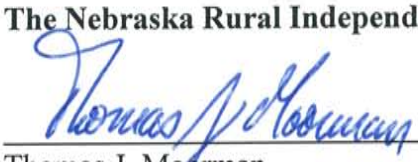
If, after appropriate lawful, fact-based and reasoned decision making that properly addresses the matters raised in these comments regarding the lack of any need for an industry-wide solution, then a dynamic recovery mechanism modeled after but modified from the current CAF-ICC needs to be considered.

Dated: September 4, 2018

Respectfully submitted,

Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Co., K. & M. Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company and Three River Telco

The Nebraska Rural Independent Companies

By: 

Thomas J. Moorman
tmoorman@woodsaitken.com
Woods & Aitken LLP
5151 Wisconsin Ave. NW, Suite 310
Washington, D.C. 20016
(202) 944-9502

Paul M. Schudel, No. 13723
pschudel@woodsaitken.com
Woods & Aitken LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
(402) 437-8500

Their Attorneys